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October 26, 2011

Public Record

Karl Morell  
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BY E-File

Cynthia Brown  
Chief, Section of Administration  
Surface Transportation Board  
Office of Proceedings  
395 E Street, SW  
Washington, DC 20423

Re: STB Finance Docket No. 35412, Middletown & New Jersey  
Railroad, LLC -- Lease and Operation Exemption -- Norfolk  
Southern Railway Company

Dear Ms. Brown:

Attached for e-filing is the Reply of Middletown & New Jersey  
Railroad, LLC to the Petition For Reconsideration filed by United  
Transportation Union-New York State.

If you have any questions, please contact me.

Sincerely,

Karl Morell  
Of Counsel

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB FINANCE DOCKET NO. 35412

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MIDDLETOWN & NEW JERSEY RAILROAD, LLC  
--LEASE AND OPERATION EXEMPTION--  
NORFOLK SOUTHERN RAILWAY COMPANY

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REPLY TO UNITED TRANSPORTATION UNION-NEW YORK STATE'S  
PETITION FOR RECONSIDERATION

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(202) 638-3307

Attorney for:  
MIDDLETOWN & NEW JERSEY  
RAILROAD, LLC.

Dated: October 26, 2011

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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STB FINANCE DOCKET NO. 35412

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MIDDLETOWN & NEW JERSEY RAILROAD, LLC  
--LEASE AND OPERATION EXEMPTION--  
NORFOLK SOUTHERN RAILWAY COMPANY

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REPLY TO UNITED TRANSPORTATION UNION-NEW YORK STATE'S  
PETITION FOR RECONSIDERATION

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Middletown & New Jersey Railroad, LLC ("M&NJ"), hereby replies in opposition to the Petition For Reconsideration filed with the Surface Transportation Board ("Board") by Samuel J. Nasca, for and on behalf of United Transportation Union-New York State Legislative Board ("UTU") on October 13, 2011 ("Reconsideration Petition").

**BACKGROUND**

On August 31, 2010, M&NJ filed its Verified Notice of Exemption, pursuant to 49 C.F.R. Part 1150, Subpart E—Exempt Transactions Under 49 U.S.C. 10902, to permit M&NJ to lease and operate certain rail lines from Norfolk Southern Railway Company ("NS"); sublease connecting track owned by New York, Susquehanna & Western Railway (the "Leased Lines"), and receive incidental overhead trackage rights ("Notice of Exemption"). On September 23, 2010, UTU filed a petition for stay to which M&NJ replied on September 28, 2010. On September 27, 2010, UTU filed a petition to revoke or reject ("Petition") to which M&NJ replied on October 15, 2010. By decision served September 29, 2010, Chairman Elliott imposed a

housekeeping stay of the effective date of the Notice of Exemption until October 7, 2010. By decision served October 6, 2010, the Board denied the petition for stay.

By decision served December 23, 2010, the Board instituted a proceeding to consider the Petition. In so doing, the Board ordered M&NJ to serve a copy of the Board's decision on all shippers on the Leased Lines since commencing operations. The Board invited interested parties to submit comments and evidence by February 4, 2011, and responses to the opening submissions by February 22, 2011. On February 4, 2011, UTU filed its Supplemental Evidence and Argument ("Supplement"). On that same day, NS filed its comments and M&NJ forwarded the comments of JCI Jones Chemical, Inc., Ampac Paper LLC, American Lumber Company and Reed Systems LTD. On February 22, 2011, M&NJ filed its reply ("Reply").

By decision served September 23, 2011, in this proceeding, the Board denied UTU's Petition to reject or revoke the Notice of Exemption ("September Decision").

#### **REPLY**

A proceeding may be reopened, and reconsideration granted, upon a showing of material error, new evidence, or changed circumstances. 49 U.S.C. § 722(c); 49 C.F.R. § 1115.3(b). UTU claims that the September Decision involves material error.

UTU once again argues that M&NJ was not a rail carrier on August 31, 2010, when it filed its Notice of Exemption, because M&NJ had not instituted freight transportation operations on its other rail lines in the vicinity. UTU claims that the Board ignored the verified statement presented by UTU. There is no basis for concluding that the Board ignored that statement. The Board was entitled to disregard it in light of the far more credible evidence submitted by M&NJ regarding the extensive operations performed by M&NJ on its other rail lines during the 17-month period before filing its Notice of Exemption.

UTU first appears to suggest that the interchange reports are not entitled to weight because they were submitted on reply and were not verified. M&NJ had no reason to submit those reports before its Reply submission because UTU for the first time raised the issue of lack of operations in the Supplement. In its earlier Petition, UTU had argued only that the class exemption did not apply because trackage rights are not embraced within the exemption and there were too many carriers involved.<sup>1</sup> Moreover, the Board was certainly entitled to rely on these reports, which were authenticated by counsel's representation as to their source.

Contrary to UTU's allegation, M&NJ never represented to the Board or UTU that the interchange reports were compiled by NS. As counsel previously explained, and as Mr. Sauer reiterates in the attached Verified Statement ("VS"), the reports were printed out of the RMI system – the official railroad EDI clearinghouse for such data – and represent a summary of the data that was supplied to Railinc by NS (for the inbound traffic) and by M&NJ (for the outbound traffic). There is no basis for questioning the accuracy of these data.

UTU's second argument is that, even if the interchanges reflected in the data supplied by M&NJ occurred, they may have reflected only "utilization of the M&NJ trackage for car storage purposes." This contention is absurd and belied by the data M&NJ has already supplied. As those data clearly show, and as Mr. Sauer further explains, during the 17-month period prior to August 31, 2010, M&NJ received 210 inbound *loaded* cars and delivered 234 outbound *loaded* cars. Those inbound and outbound loads quite obviously did not reflect cars placed on the line solely for storage; Mr. Sauer explains that they in fact reflected M&NJ's providing newly invigorated rail service to on-line customers. As further evidence of M&NJ's railroad

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<sup>1</sup> In any event, if UTU had any evidence that the interchange reports were false or fraudulent, UTU could have sought leave to file a reply or it could have filed a motion to strike.

operations, attached to Mr. Sauer's VS are a few Railroad Injury and Illness Summary reports submitted by M&NJ to the Federal Railroad Administration ("FRA") under penalty of perjury.

Third, UTU claims that the attached decisions of the Railroad Retirement Board ("RRB") further demonstrate that M&NJ was not a railroad on August 31, 2010 because the M&NJ decision was not issued until recently. But the M&NJ decision expressly found that M&NJ became a railroad as of April 6, 2009, when it commenced operations.

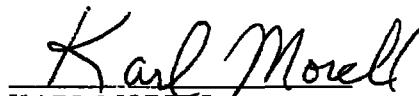
UTU next fantasizes that the only M&NJ employee when operations commenced was perhaps on the Regional Rail roster or worked elsewhere than Middletown, NY. This unsupported speculation is false. Attached to Mr. Sauer's VS are random daily time reports prepared by that first employee and demonstrate that he worked on the M&NJ.

Finally, UTU takes issue with the Board's finding that M&NJ became a rail carrier on the date that it acquired the Middletown-Slate Hill rail line, rather than on the date when it commenced rail operations. That, however, is a non-issue in this proceeding because the record amply shows that M&NJ commenced operations prior to filing its Notice of Exemption in this case. In fact, M&NJ commenced operations the day after it consummated the acquisition of the Middletown-Slate Hill rail line.

## CONCLUSION

M&NJ respectfully urges the Board to deny the Reconsideration Petition. The evidence of record in this proceeding overwhelmingly demonstrates that M&NJ was an active rail carrier on the day it filed its Notice of Exemption.

Respectfully submitted,

A handwritten signature in cursive script that reads "Karl Morell". The signature is written in dark ink and is positioned above the printed name.

KARL MORELL  
Of Counsel  
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Suite 225  
655 Fifteenth Street, N.W.  
Washington, DC 20005  
(202) 638-3307

Attorney for:  
MIDDLETOWN & NEW JERSEY RAILROAD,  
LLC

Dated: October 26, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26<sup>th</sup> day of October, 2011, I have caused a copy of the foregoing Reply to be served on all parties of record.

Karl Morell

Karl Morell

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**STB Finance Docket No. 35412**

**MIDDLETOWN & JERSEY RAILROAD, LLC  
-- LEASE AND OPERATION EXEMPTION --  
NORFOLK SOUTHERN RAILWAY COMPANY**

**VERIFIED STATEMENT OF ALFRED SAUER**

My name is Alfred Sauer. I am Vice President of Middletown & New Jersey Railroad, LLC ("M&NJ"), 505 South Broad Street, Kennett Square, PA 19348.

As the interchange reports attached as Exhibit 5 to M&NJ's Reply dated February 22, 2011 demonstrate, M&NJ handled a significant number of loaded cars on its line beginning on April 9, 2009. Those interchange reports were printed out of the RMI system. These reports represent a summary of the data that was transmitted through Railinc (the railroad industry EDI clearinghouse). All data regarding inbound shipments was submitted by Norfolk Southern Railway Company ("NS") to Railinc and all data regarding outbound shipments was submitted by M&NJ to Railinc.

Prior to August 31, 2010, when M&NJ filed its Notice of Exemption in this proceeding, M&NJ handled a total of 210 inbound loaded cars and a total of 234 outbound loaded cars on its line. The inbound loaded cars were loaded with such commodities as plastics, fertilizers, grain products, potatoes, and onions and outbound loaded cars contained containerized shipments of contaminated soil shipped from a nearby EPA clean-up site. While some of the empty inbound cars were placed in "storage," many were used for the outbound shipment of contaminated soil.

When M&NJ started operations of its line in April 2009, the railroad was down to only one remaining customer. Within a few months, M&NJ spent significant capital to convert dormant M&NJ property into a public rail to truck transload facility. After this facility was

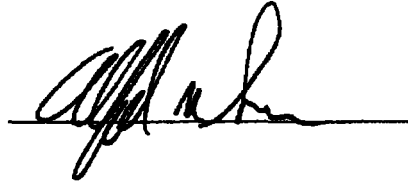
completed, M&NJ was successful in securing both inbound and outbound rail shipments from nine new customers. NS joined M&NJ in marketing the transload facility to potential customers. These efforts were so successful that NS awarded to M&NJ both the Business Development Award from its Agriculture, Fertilizer, and Consumer Products marketing group, and a Business Initiative Award for developing 250-500 annual carloads of new business. These awards were presented to M&NJ in July 2010, well before M&NJ filed its Notice of Exemption in this proceeding.

In April 2009, when M&NJ commenced operations, M&NJ had one fulltime employee, Bryan Van Kirk, who performed many functions. Attached as Exhibit 1 are random daily time reports prepared by Mr. Van Kirk.

As further evidence of M&NJ's operations, attached as Exhibit 2 are a few random Railroad Injury and Illness Summary reports submitted to the Federal Railroad Administration under penalty of perjury. The first report, dated May 1, 2009, demonstrates that in April 2009, M&NJ had 46 railroad worker hours and 15 freight train miles. One year later, in April 2010, M&NJ had 381.5 railroad worker hours and 163 freight train miles.

I, Alfred Sauer, declare under of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file Verified Statement.

Executed on October 21 2011

A handwritten signature in black ink, appearing to read 'Alfred Sauer', is written over a horizontal line.

**Middletown & New Jersey Railroad, LLC**  
**DAILY TIME REPORT**

WEEK ENDING: May 2nd / 09

NAME: Rayan Ural Es No: \_\_\_\_\_

[illegible]

**TOTAL:** 43.5 ✓

I hereby authorize the Payroll Department to issue the above check for the week ending: 11/11/2011

  
Bryan Van Kirk  
General Manager

Employee Raymond

**Occupation:**

**TRANS = Transportation**

**LOCO = Loco Repair**

**MOW/S = MOW - State**

**MOW/CAP = MOW - Capital**

**MOW/I&R = MOW - Inspection & Repair**

**H = Holiday**

**V = Vacation**

**S = Sick**

WEEK ENDING: May 23 09

[illegible]

74 hrs

# NEW JERSEY RAILROAD, LLC DAILY TIME REPORT


WEEK ENDING: 3/13/10

NAME: Bryce Van Lih

**Es No:**[illegible]

I hereby authorize the Payroll Department to issue the above check for the week ending \_\_\_\_\_

**TOTAL: 43**

  
Bryan Van Kirk  
General Manager

Rayen VanKort  
Employee

40 kg  
3 01

**Occupation:**

TRANS = Transportation

**LOCO** = Loco Repair

**MON/23 = MON - State**

**MOW/CAP = MOVE - Capital**

**MOW/IR = MOW - Inspection & Repair**  
H = Holiday

**H = Holiday**

**V = Vacation**

**S = Sick**

**OMB No. 2130-0500**

1. Name of Reporting Railroad <b>MIDDLETOWN &amp; NEW JERSEY RAILROAD LLC</b>		2. Alphabetic Code <b>NJ</b>	3. Report Month & Year <b>APRIL '09</b>	4. State Alphabetic Code <b>NJ</b>	5. County <b>ORANGE</b>
6. Name of Reporting Officer <b>ROBERT C. PARKER</b>			7. Official Title <b>PRESIDENT AND CEO</b>		
8. Address <b>505 S. BROAD STREET KENNET SQUARE, PA 19348</b>			9. Telephone (Area Code) (Number) <b>(610) 925-0131</b>		
10. If executed within the United States, its territories, possessions, or commonwealths: I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on <u>May 1 2009</u> (date) <u>[Signature]</u> (Signature). If executed without (i.e., outside of) the United States: I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on _____ (date). _____ (Signature).					
OPERATIONAL DATA & ACCIDENT/INCIDENT COUNTS FOR REPORT MONTH					
11. Freight Train Miles <b>15</b>		12. Passenger Train Miles <b>0</b>		13. Yard Switching Train Miles <b>0</b>	
14. Other Train Miles <b>0</b>		15. Railroad Worker Hours <b>46</b>		16. Passenger Miles Operated <b>0</b>	
		17. Number of Passengers Transported <b>0</b>			
18. REPORTED CASUALTIES			18. NUMBER OF FRA FORMS ATTACHED		
Type of Person	Fatal	Nonfatal	FRA Form Number	Number Attached	
Worker on duty - railroad employee			6180.54	<b>0</b>	
Railroad employees not on duty			6180.55a	<b>0</b>	
Passengers on trains			6180.56	<b>0</b>	
Nontrespassers/ on railroad property			6180.57	<b>0</b>	
Trespassers			6180.81	<b>0</b>	
Worker on duty - contractor					
Contractor - other					
Worker on duty - volunteer					
Volunteer - other					
Nontrespassers/ off railroad property					
Grand total					
20. Remarks Section. Please describe operational, environmental, or other circumstances that account for unusual fluctuations in train miles operated, employee hours, or passenger counts.					
NOTE: This report is part of the reporting railroad's accident report pursuant to the accident reports statute and, as such shall not "be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report." 49 U.S.C. 20903. See 49 C.F.R. 225.7 (b).					
This collection of information is mandatory under 49 CFR 225, and is used by FRA to monitor national rail safety by tracking - on a continual basis - all rail accidents/incidents above a stipulated dollar threshold. Public reporting burden is estimated to average 10 minutes per response, including the time for reviewing instructions, searching existing databases, gathering and maintaining the data needed, and completing and reviewing the collection of information. The information collected is a matter of public record, and no confidentiality is promised to any respondent. Please note that an agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control number for this collection is 2550-0500.					

## RAILROAD INJURY AND ILLNESS SUMMARY

OMB No. 2130-0500

1. Name of Reporting Railroad <b>MIDDLETOWN &amp; NEW JERSEY RAILROAD LLC</b>	2. Alphabetic Code <b>MLN</b>	3. Report Month & Year <b>APRIL 2010</b>	4. State Alphabetic Code <b>NY</b>	5. County <b>ORANGE</b>
6. Name of Reporting Officer <b>ROBERT C. PARKER</b>			7. Official Title <b>PRESIDENT AND CEO</b>	
8. Address <b>505 S. BROAD STREET KENNET SQUARE, PA 19348</b>			9. Telephone (Area Code) (Number) <b>(610) 925-0131</b>	
10. If executed within the United States, its territories, possessions, or commonwealths: I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on <u>5/5/10</u> (date) <u>Robert C. Parker</u> (Signature). If executed without (i.e., outside of) the United States: I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on _____ (date). _____ (Signature).				

## OPERATIONAL DATA &amp; ACCIDENT/INCIDENT COUNTS FOR REPORT MONTH

11. Freight Train Miles <b>163</b>	12. Passenger Train Miles <b>0</b>	13. Yard Switching Train Miles <b>0</b>	14. Other Train Miles <b>0</b>	
15. Railroad Worker Hours <b>381.5</b>	16. Passenger Miles Operated <b>0</b>	17. Number of Passengers Transported <b>0</b>		
18. REPORTED CASUALTIES			19. NUMBER OF FRA FORMS ATTACHED	
Type of Person	Fatal	Nonfatal	FRA Form Number	Number Attached
Worker on duty - railroad employee			6180.54	<b>0</b>
Railroad employees not on duty			6180.55a	<b>0</b>
Passengers on trains			6180.56	<b>0</b>
Nonresidents on railroad property			6180.57	<b>0</b>
Trespassers			6180.61	<b>0</b>
Worker on duty - contractor				
Contractor - other				
Worker on duty - volunteer				
Volunteer - other				
Nonresidents off railroad property				
Grand total				

20. Remarks Section. Please describe operational, environmental, or other circumstances that account for unusual fluctuations in train miles operated, employee hours, or passenger counts.

NOTE: This report is part of the reporting railroad's accident report pursuant to the accident reports statute and, as such shall not be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report. 49 U.S.C. 20803.  
See 49 C.F.R. 223.7 (b)

This collection of information is mandatory under 49 CFR 223, and is used by FRA to monitor national rail safety by tracking - on a continual basis - all rail accidents/incidents above a stipulated dollar threshold. Public reporting burden is estimated to average 10 minutes per response, including the time for reviewing instructions, searching existing databases, gathering and maintaining the data needed, and completing and reviewing the collection of information. The information collected is a matter of public record, and no confidentiality is promised to any respondent. Please note that an agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control number for this collection is 2130-0500.

## RAILROAD INJURY AND ILLNESS SUMMARY

OMB No. 2130-0500

1 Name of Reporting Railroad <b>MIDDLETOWN &amp; NEW JERSEY RAILROAD LLC</b>	2 Alphabetic Code <b>MNJ</b>	3 Report Month & Year <b>JULY 2010</b>	4 State Alphabetic Code <b>NY</b>	5 County <b>ORANGE</b>
6 Name of Reporting Officer <b>ROBERT C. PARKER</b>			7 Official Title <b>PRESIDENT AND CEO</b>	
8 Address <b>505 S. BOND STREET KENNET SQUARE, PA 19348</b>			9 Telephone (Area Code) (Number) <b>(610) 925-0131</b>	
10. If executed within the United States, its territories, possessions, or commonwealths: I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on <u>8/9/10</u> (date) <u>RCP</u> (Signature) If executed without (i.e., outside of) the United States: I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on _____ (date). _____ (Signature).				

## OPERATIONAL DATA &amp; ACCIDENT/INCIDENT COUNTS FOR REPORT MONTH

11. Freight Train Miles <b>44</b>	12. Passenger Train Miles <b>0</b>	13. Yard Switching Train Miles <b>0</b>	14. Other Train Miles <b>0</b>
15. Railroad Worker Hours <b>137</b>	16. Passenger Miles Operated <b>0</b>	17. Number of Passengers Transported <b>0</b>	

18. REPORTED CASUALTIES			19. NUMBER OF FRA FORMS ATTACHED	
Type of Person	Fatal	Nonfatal	FRA Form Number	Number Attached
Worker on duty - railroad employee			6180.54	<b>0</b>
Railroad employees not on duty			6180.55a	<b>0</b>
Passengers on trains			6180.56	<b>0</b>
Nonresidents/ on railroad property			6180.57	<b>0</b>
Trespassers			6180.61	<b>0</b>
Worker on duty - contractor				
Contractor - other				
Worker on duty - volunteer				
Volunteer - other				
Nonresidents/ off railroad property				
Grand total				

20 Remarks Section. Please describe operational, environmental, or other circumstances that account for unusual fluctuations in train miles operated, employee hours, or passenger counts.

NOTE This report is part of the reporting railroad's accident report pursuant to the accident reports statute and, as such shall not be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report. 49 U.S.C. 20903.  
See 49 C.F.R. 238.7 (b).

This collection of information is mandatory under 49 CFR 238, and is used by FRA to monitor national rail safety by tracking - on a continual basis - all rail accidents/incidents above a stipulated dollar threshold. Public reporting burden is estimated to average 10 minutes per response, including the time for reviewing instructions, searching existing databases, gathering and maintaining the data needed, and completing and reviewing the collection of information. The information collected is a matter of public record, and no confidentiality is promised to any respondent. Please note that an agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control number for this collection is 2130-0500.